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Laura S. Underkuffler

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# RELIGIOUS FREEDOM IN AN EGALITARIAN AGE: REJECTING DOCTRINAL NIHILISM IN THE ADJUDICATION OF RELIGIOUS CLAIMS

LAURA S. UNDERKUFFLER<sup>1</sup>

## I. INTRODUCTION

In his book, *Religious Freedom in an Egalitarian Age*,<sup>2</sup> Nelson Tebbe takes on one of the most intractable problems in contemporary American culture: the conflict between claimed religious commands and secular norms that establish human rights.<sup>3</sup>

Of course, there would not necessarily *have* to be a conflict between these forces.<sup>4</sup> Religious rights of freedom of belief and expression could be experienced in individually private settings, or in institutional settings comprised of like-minded believers such as religious schools, synagogues, churches, and mosques.<sup>5</sup> However, even in those settings conflicts arise.<sup>6</sup> Religious schools can admit or employ individuals who later object to evolving religious doctrines and practices, and who claim the protection of secular laws.<sup>7</sup> Synagogues, churches, and mosques can experience similar conflicts with congregants or employees. In American law, ideas of religious-group autonomy proposed solutions for such conflicts, but they establish – at best – jagged and uncertain lines of religious institutional exemption from secular law.<sup>8</sup>

In addition, and of most pressing current importance, religious individuals can assert refusals to comply with secular human-rights laws.<sup>9</sup> Religious individuals do not confine themselves to some kind of separate religious sphere; they are usually active and involved in all aspects of community life. They run

<sup>1</sup> J. DuPratt White Professor of Law, Cornell University.

<sup>2</sup> NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* (2017).

<sup>3</sup> Conflicts between religious demands and secular norms is also a problem of international dimensions. As the editors of a recent volume exploring religion/government conflicts write, “in many countries around the world, religion . . . is perceived as one of the most significant threats to the liberal identity of countries and individuals. Beyond the negative sentiment and the pragmatic threat that liberals at times experience toward different religions, parts of the liberal intellectual tradition . . . seem[] to consider religion as a threat to the liberal world and its dedication to human rights.” See Hanoch Dagan, Shahr Lifshitz, and Yedidia Z. Stern, *RELIGION AND THE DISCOURSE OF HUMAN RIGHTS* 11 (2014).

<sup>4</sup> *Id.*

<sup>5</sup> For a discussion of the legal confusion in this area, see Laura S. Underkuffler, *Thoughts on Smith and Religious Group Autonomy*, 2004 BYU L. REV. 1773, 1776 (2004).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1784–85.

<sup>8</sup> *Id.* at 1773.

<sup>9</sup> TEBBE, *supra* note 2, at 1, 5.

businesses, they offer services, and they work in government offices. It is the question of the enforcement of government civil-rights laws in those settings that is the primary focus of Tebbe's study. For instance, how should we resolve public-accommodation and service cases, such as the refusal – on religious grounds – of a photographer to render services for a gay wedding ceremony, or the refusal of a company psychiatrist to counsel same-sex couples? Should we permit a religious employer, who employs members of the general public, to refuse to hire women who “co-habit” with men, or to terminate employees who publish sentiments on Facebook that contravene church teaching? Can a religious employer refuse to supply certain employee health coverage, which is required by federal law, on the ground that it might lead to actions by employees that are repugnant to the employer's religious beliefs?

In this thoughtful, groundbreaking, and meticulously balanced book, Tebbe suggests new ways to look at these conflicts.<sup>10</sup> Although he discusses the relative merits of particular conflicting claims, the truly innovative – and, I would predict, the most lasting – accomplishment of the book is to fundamentally challenge the way in which these conflicts are approached.

The difficulties involved in religious/equality cases has, over time, led to an attitude that these cases are beyond ordinary judicial processes. When we think of conflicts between religion and secular norms of equality, we tend – in Tebbe's words – to assume an area of law that is “*inherently* or *necessarily* patternless.”<sup>11</sup> We tend to think of these conflicts as boiling down to a personal view as to which is more intrinsically important – religion or equality. Although there is talk about “judicial evaluation” and “judicial processes,” the reality is that any kind of real analysis of the claims, under any kind of agreed-upon principles, is impossible.<sup>12</sup> We see each conflict as a kind of new ad hoc battle, with resolution depending (as a practical matter) only upon the identity and personal beliefs of the one who decides.

<sup>10</sup> See generally TEBBE, *supra* note 2.

<sup>11</sup> *Id.* at 5 (emphasis in original).

<sup>12</sup> *Id.*

Tebbe does not deny the practical power of this kind of doctrinal skepticism (or what I would call doctrinal “nihilism”) in disputes between religion and secular norms.<sup>13</sup> Indeed, the unabashed passions of the participants in these cases seem to compel this conclusion, as a personal matter at least. However, in his book Tebbe separates the *personal convictions* of participants from the *required analysis* of courts.<sup>14</sup> Although the use of neutral principles in the reconciliation of personal convictions in such cases might be impossible, in the courts – he claims – it is not.

Tebbe’s argument proceeds along two separate tracks. First, he rejects the arguments of academic skeptics and others that these conflicts are by nature something that is not amenable to the judicial task.<sup>15</sup> Rather, he argues, conflicts between religious freedom and civil rights *can* be worked through by courts, using what he calls a “social coherence” approach.<sup>16</sup> This does not, of itself, “pretend to determine unique answers to pressing substantive questions”;<sup>17</sup> but it establishes a way to generate reasoned conclusions that are intrinsically superior to the *ad hockery* or nihilistic approach that skeptics assume.

Next, Tebbe combines this approach with four substantive legal principles that he argues to be critical to managing tensions between religion and equality guarantees. These principles are explicitly normative; they establish “a substantive vision of how conflicts between traditional believers and egalitarians ought to be resolved.”<sup>18</sup> These principles are: avoiding harm to others; concern for fairness to others; refinement of ideas of freedom of association; and the implementation a policy of non-endorsement of religion by government.<sup>19</sup>

These commitments – both methodological and substantive – set forth a bold statement in an area in which tensions run high and muddled thinking is endemic. Although (necessarily) imperfect, they promise to advance what has otherwise been a

<sup>13</sup> *Id.*

<sup>14</sup> *See generally id.*

<sup>15</sup> *See* TEBBE, *supra* note 2, at 5.

<sup>16</sup> *Id.* at 26.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *See id.* at 14.

largely self-referential and unfocused debate. Tebbe's methodological prescription and his first two substantive principles, in particular, challenge deep and unspoken assumptions that have entered this area of law; and they promise to fundamentally alter the way that these conflicts are approached.<sup>20</sup> It is therefore upon those innovations that I will focus in these remarks.

## II. FOUNDATIONAL ISSUES: PARTICULAR PROBLEMS INHERENT IN RELIGIOUS CLAIMS

Conflicts among fundamental values are nothing new in American law. Indeed, conflicts among *constitutional* guarantees representing the most fundamental societal values, and the rights that they generate is nothing new.<sup>21</sup> Conflicts can arise between free speech and a fair trial; between the guarantee of personal liberty and the right to privacy; between the right to equality and the right to property; and in a myriad of other cases. Fundamental societal commitments, expressed through law, are almost never precisely delineated or immune from conflicts with other fundamental societal commitments. Yet, in judicial decision-making, we proceed with confidence that these conflicts can be resolved in an intelligent way. We do not wring our hands or proclaim that resolution of such conflicts is "impossible," or the generated principles are "inherently conflicted" or "incoherent."

Yet, that is precisely what is claimed by many analysts of religion/government conflicts.<sup>22</sup> Thus the question is posed: why are conflicts involving religious claims regarded with such singular pessimism – indeed, nihilism – in American law?

The roots of the problem are deep and, seemingly, legally intractable. To begin, there is the courts' acknowledged incompetence in determining what a protected religious claim is. In a society in which asserted religious claims are limited in kind

<sup>20</sup> See TEBBE, *supra* note 2, at 14.

<sup>21</sup> KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW 10 (2015).

<sup>22</sup> See, generally BRADY; Stanley Fish, *Where's the Beef?*, 51 SAN DIEGO L. REV. 1037, 1043 (2014); Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043, 1043 (2014); STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 45 (2001). As Tebbe states, skeptics often express the view that judicial decisions about religious claims will "necessarily . . . devolve into conclusory thinking, irrationality, or ipse dixitism." See TEBBE, *supra* note 2, at 7.

and relatively noncontroversial in content, judicial evaluation of what protected “religion” is might not engender much controversy. However, in a religiously diverse society such as the United States, which is full of free thinkers, identifying protected religious claims can be a difficult task. The Supreme Court has long struggled with this issue, with no resolution to date. Definitions of religion in traditional, theistic terms by the Court<sup>23</sup> have yielded to broad inclusions of non-theistic religions such as Buddhism, Taoism, Ethical Culture, and Secular Humanism.<sup>24</sup> In its latest formulations, the Court has vaguely asserted that religious beliefs are those that are “sincere and meaningful,” and “occupy a place in the life of those who hold them that is parallel to that filled by the orthodox belief in God.”<sup>25</sup> There is, of course, an obvious problem here – couldn’t just about any strong belief qualify under this test?<sup>26</sup> Faced with this objection, the Court has insisted that religious beliefs are more than mere philosophical convictions.<sup>27</sup> However, just how they are different has never been satisfactorily explained.<sup>28</sup>

Concurrently with of this difficulty, the Court has adhered to the principle that courts are not competent to examine the existence, legitimacy, or sincerity of declared religious beliefs. Famously, the Court pronounced in *United States v. Ballard*<sup>29</sup> that “[m]en may believe what they cannot prove . . . Religious expressions which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.”<sup>30</sup> In practice, this has meant that the Court has simply accepted the legitimacy of asserted religious

<sup>23</sup> See, e.g., *United States v. Macintosh*, 283 U.S. 605, 633-634 (1931) (Hughes, C.J., dissenting) (religion as “a belief in God involving duties superior to those arising from any human relation”); *Davis v. Beason*, 133 U.S. 333, 342 (1890) (religion as “one’s views of his relations to his Creator, and . . . the obligations they impose”).

<sup>24</sup> See *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961).

<sup>25</sup> See *United States v. Seeger*, 380 U.S. 163, 176 (1965).

<sup>26</sup> *Seeger*, 380 U.S. 176.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *United States v. Ballard*, 322 U.S. 78, 86–87 (1944).

<sup>30</sup> *Ballard*, 322 U.S. 86-87.

claims, even when they were far from anything resembling mainstream beliefs.<sup>31</sup>

The legal problems that this situation has created are two-fold. First, it has meant that individually claimed and legally cognizable religious beliefs can be virtually anything, including – in our present context – claims that are flatly contradictory to existing government norms.<sup>32</sup> In addition, and more importantly as a matter of legal culture, the idea that courts are fundamentally incompetent to evaluate the bona fide nature of religious claims has reinforced the idea that religious claims – by nature – are unique, transcendently powerful, and something apart from government critique, regulation, or control.

Indeed, the last conclusion is reinforced by the intrinsic nature of religious claims themselves. A signature characteristic of most religious claims is the assertion that they are grounded in absolute belief, embody absolute truth, and command absolute authority. It is therefore intrinsic to religious beliefs that they are not open to question or reconsideration, either by religious believers (in most cases) or when confronted by secular law. Resolving conflicts between a free press and a fair trial might involve re-evaluation and revision of the fundamental beliefs involved in both sides of the equation; but resolving conflicts between individuals' true religious beliefs and secular law does not. In other words, because of its nature, the religious belief is assumed – by the believer and by others – to be immune from forced reevaluation or critique as a part of a conflict-adjudication process. It cannot be subjected to fundamental question, either as a matter of truth (for the believer) *or* as a matter of policy

<sup>31</sup> See, e.g., *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 475 (2009); *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005) (asserted religious claims by believers in the Church of Jesus Christ Christian, a white supremacist organization; the followers of Asatru, a polytheistic religion with claimed Northern European origins; a Satanist; and a witch).

<sup>32</sup> This problem was at the root of the holding in *Employment Division v. Smith*, 494 U.S. 872, 882–83 (1990), in which the Supreme Court attempted to eliminate the idea that religious believers are exempt – as a federal constitutional matter – from otherwise neutral and generally applicable secular law. See *id.* at 878. As Justice Scalia (the author of the majority opinion) observed, government cannot afford to create a situation in which “each conscience is a law unto itself.” *Id.* at 890. This holding does not, of course, solve the dilemma of clashing religious claims and equality laws addressed by Tebbe’s book; those claims are asserted under newer federal and state statutory protections for religion, not federal constitutional law. See, e.g., Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et. seq.; Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc (et. seq.).

analysis by courts. Under this model, in cases of conflict the religious claim is posited to be true, and that truth – *and its effects* – must be *accommodated* by others. To put it simply, the prevailing model presumes (as incontestable) that a religious belief is good, true, powerful, and unchanging in the life of the believer; and that, by clear implication, those characteristics must be accepted – vis-a-vis others – in its consideration by courts.

### III. THE BOOK'S CHALLENGE

Against this difficult backdrop, we have the arguments of Tebbe's book. As stated above, he rejects the implications of the doctrinal difficulties just described and the conclusions of academic skeptics, and argues that conflicts between religious beliefs and government equal-rights norms can, in fact, be evaluated in a meaningful and principled way.

#### A. The "Social Coherence" Approach

Let us take, first, Tebbe's methodological prescription. Using what he calls a "social coherence" approach to religion/equality conflicts, Tebbe describes "a way of working through these problems that is capable of generating reasoned conclusions."<sup>33</sup> The key, he argues, is that these conflicts should be approached in "the way that people reason through moral problems in everyday life."<sup>34</sup> When people confront a new issue, "they compare it to familiar situations and to conclusions they have [previously] drawn about them after careful consideration."<sup>35</sup> There is then an effort to "try to find a resolution [to the current problem] that fits together their existing judgments . . . Working back and forth, they [work to] test out solutions," looking for harmony with commitments and conclusions that they have previously drawn.<sup>36</sup>

Important to this process is that "[n]othing is foundational, in principle; even long-standing convictions can be revised in light

<sup>33</sup> TEBBE *supra* note 2, at 8.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*



of new evidence or new thinking.”<sup>37</sup> When a conclusion is reached, it is one that “resonates with their other judgments,” and is “backed by reasons” acceptable to them.<sup>38</sup> The ultimate conclusion, thus, is not reflexive or ad hoc; it is derived through a process of comparison, evaluation, and reasoned deliberation.

The skeptic could undoubtedly attack Tebbe’s approach on the basis that it is naive, and contrary to the fundamental nature the of claims that it adjudicates. Most glaringly, the starting point that “[n]othing is foundational, in principle”<sup>39</sup> might be acceptable to the proponent of the government norm, but would hardly be acceptable to the religious adherent. The essence of religious belief – as discussed above – is that it is absolute, foundational, and transcendent in its command. How could a religious believer be expected to suddenly abandon this conviction? How can religious belief be expected to be open to “new evidence,” or “new thinking”?

Take, for instance, the religious belief that marriage must be between a man and a woman – something that is commonly asserted against marriage-equality laws. This belief is not likely to be abandoned as “non-foundational” or “ill-advised” because a particular method of dispute resolution is suggested. The social coherence approach might be something that is routinely used in ordinary common-law adjudication (as Tebbe claims),<sup>40</sup> but that is just the point – it demands assumptions and flexibility that are *by their very nature* untenable to the religious believers who are involved in religion/equality conflicts. Indeed, one could say, this methodological “solution” to the nonjusticiability of religious claims deals with the problem of the nature of the religious claim by ignoring it.

This objection has an immediate and compelling surface appeal. Indeed, it can be seen as simply a statement of the inevitable consequences of the idea of nature of religious beliefs and their required treatment in cases of secular-law conflict, as described in the Supreme Court jurisprudence above. If religious

<sup>37</sup> *Id.* at 9.

<sup>38</sup> TEBBE *supra* note 2, at 9.

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *See id.* (“Lawyers and judges argue over the correct interpretation and application of legal doctrines by reference to established precedents and principles, using a more formal and institutionalized version of the coherence method.”).

beliefs must be accepted as absolutely true, transcendent, and unassailable in the life of the believer, then this character must be accommodated when conflicts between those beliefs and secular norms are adjudicated by courts. The idea that “long-standing [religious] convictions can be revised,” or questioned, or harmonized with other judgments<sup>41</sup> is not something that can be asked of the religious believer, and therefore is not something that can be engaged in by courts.

However, let us pause at this point, and consider what was just written. Upon reflection, the logical sequence that is found in the last sentence is, in fact, illogical. We might well assume (as the courts have done) that religious beliefs are good, true, powerful, and unchanging in the lives of religious believers. But why must this be the way that those beliefs *are regarded by courts*?

Consider, for instance, the following example. A religious adherent asserts that her absolute, unerring, unchangeable, and transcendent religious beliefs prohibit her signing – as clerk of the local town – the marriage licenses of same-sex couples. That situation and its consequences might, indeed, be real to her. The truth of that belief, for her, cannot be questioned by the court. But does that make the conflict legally or constitutionally “nonjusticiable”? The assertion by the religious adherent – when considered in an adjudicative context – is, in truth, no different from the assertion by a parent that he *must* have sole custody of a child, or by an accident victim that he *must* receive compensation from an accident, or that some other result *must* be forthcoming. The claims of individuals about the consequences of decisions are routinely taken into account by courts in the making of their independent and detached judgments. However, the fact that individuals assert personal catastrophic consequences does not mean that the adjudication of the conflict by the court – using its normal processes – is paralyzed, or impossible.

To put it another way, the claim of skeptics and others that religious claims are “nonjusticiable” – that is, that they are placed *by their nature* beyond the usual processes and principled cognizance of courts – depends upon what I would call the “transference fallacy” in religion/government conflicts. *This*

<sup>41</sup> *Id.*

*fallacy assumes the transference of the religious adherent's characterization of the nature of her claim into the court's understanding, and workings, of its own processes.* In fact, this transference is neither logically justified nor institutionally commanded. The acceptance of the idea that a claim has assertedly dire and unquestioned consequences for an individual *does not mean* that the usual methods for resolving conflicting legal claims cannot be utilized by courts.

By suggesting that religion/equality conflicts should be subjected to ordinary, evaluative judicial processes, Tebbe brilliantly illuminates the existence of the transference fallacy in this context. The methodological suggestion that Tebbe makes – that courts rationally compare, re-evaluate, and consider conflicting claims – is something that is accepted in all other adjudicative contexts. The fact that this modest methodological suggestion *seems so radical* in this context is a testament, itself, as to how deeply ingrained the transference fallacy in the adjudication of religion cases has become.

The primary objective of Tebbe's book is to identify a technique that decisionmakers can use to resolve conflicts as a matter of constitutional or other law. Although he suggests that the antagonists themselves might find the method he suggests to be enlightening,<sup>42</sup> convincing them to abandon preconceived notions and to come to an amicable compromise is not the primary focus of the book. The question, rather, is how our legal institutions can approach and resolve religion/equality conflicts in a principled way. When a religion/equality conflict is before a court, a decision to protect the religious claim must be "backed by reasons" and "resonate[] with other judgments."<sup>43</sup> It must be the product of the evaluation of all evidence, and the weighing of all societal commitments. Tebbe's methodology rejects the idea that courts should handle religious claims in the way that religious adherents see them, and affirms – instead – the usual workings of the courts.

<sup>42</sup> *Id.* at 11 (one purpose of the book is to "encourage antagonists to have conversation itself, and to do so by offering explanation, without relying on raw power contests . . .").

<sup>43</sup> TEBBE, *supra* note 2, at 9. Tebbe explains that through reaching a conclusion backed by reasons, it may be claimed that the "conclusion is demanded or determined by those reasons."

*B. The Adoption of Substantive Principles*

Once the use of the courts' usual adjudicative process is in place, the next question is immediately posed. In any area of legal adjudication, there are certain substantive principles that are articulated and applied by courts. For instance, there are articulated principles that govern the courts' evaluations of conflicts between free-speech claims and libel laws, freedom of the press and fair trial guarantees, liberty claims and criminal laws, and all other claims asserted as a matter of constitutional or other law. In all of these contexts, there are substantive principles that are derived from deeper societal commitments, and that are considered, re-considered, and applied to resolve the problems before the courts.

When we consider the mass of detailed legal evaluations that appear in those contexts, we are suddenly aware of a general peculiarity when religion/law conflicts are considered by courts. When religion conflicts with secular law, it seems to be generally assumed that religion – because of its unknowable and unquestioned character – is something that is, itself, immune from judicial critique. No matter how serious the conflict between religious claims and secular norms, courts will tend to go to great pains to avoid any disparaging or critical comment on the nature of the religious claims. There is almost never any evaluation of whether particular religious claims are “good,” or “desirable,” or “morally grounded,” as compared to any external metric. Whether this is because courts believe themselves to be institutionally incompetent to make such judgments, or simply want to avoid offense to religious believers, is usually unclear. Either way, the result is the same. Normative judgments – the ordinary grist in deciding difficult constitutional and other legal cases – are often (indeed, structurally) put aside.

To illustrate this phenomenon, consider a familiar “doctrinal chestnut” in religion/government conflict cases: the Supreme Court’s compelling-interest test.<sup>44</sup> Although eventually

<sup>44</sup> See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989) (holding the governmental interest in uniformly applying taxes was a compelling interest, and thus justified even if there were a substantial burden); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-19 (1981) (holding the State’s interests did not justify the burden placed on free exercise of religion); *Wisconsin v. Yoder*, 406 U.S. 205,

abandoned by the Court in federal constitutional cases,<sup>45</sup> it remains the test in cases brought under federal and state statutory free-exercise guarantees.<sup>46</sup> Under the classic formulation of this test, claims to act in accordance with religious beliefs are protected if they are required by central religious tenets; they are substantially burdened by government action; and they are not outweighed by compelling interests asserted by government.<sup>47</sup>

This test appears to be complex and multi-part; but because religious claimants are effectively free to define the content of their religious beliefs, and thus the profundity of their conflicts with secular norms,<sup>48</sup> the first two prongs of this test were rarely of any practical importance in Supreme Court jurisprudence.<sup>49</sup> Very rarely did the Court question whether a claimed religious exercise was required by a central religious belief, or

220-21 (1992) (holding that despite compulsory education serving a compelling state interest, the requirement substantially burdened Amish parents' right to free exercise).

<sup>45</sup> See *Smith*, 494 U.S. at 878.

<sup>46</sup> See 42 U.S.C. §2000bb ("The purposes of this *Act* are – to *restore* the compelling interest test. . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose *religious* exercise is substantially burdened by government.") (emphasis added); see also 42 U.S.C. §2000cc ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person. . . unless the government demonstrates that imposition of the burden on that person . . . is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.").

<sup>47</sup> See *Hernandez*, 490 U.S. at 699 ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."); *Thomas*, 450 U.S. at 718 ("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious by showing that it is the least restrictive means of achieving some compelling state interest."); *Yoder*, 406 U.S. at 214 ("In order for [the state action to be upheld] against a claim that [such action] interferes with the practice of a legitimate religious belief, it must appear either that the States does not deny the free exercise of religious belief by its requirement, or that there is a state interests of sufficient magnitude to override the interests claiming protection under the *Free Exercise Clause*.").

<sup>48</sup> See *Smith*, 494 U.S. at ("Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions, but the conduct itself must be free from governmental regulation.").

<sup>49</sup> See, e.g., *United States v. Lee*, 455 U.S. 252, 257 (1982) (quoting *Thomas*, 450 U.S. at 716) ("Although the Government does not challenge the sincerity of [the appellee's religious] belief, the Government does contend that payment of Social Security taxes will not threaten the integrity of the [appellee's] . . . religious beliefs or observances. It is not within 'the judicial function and judicial competence,' however, to determine whether appellee or Government has the proper interpretation of the [appellee's] . . . faith . . .").

substantially burdened by the complained-of government action.<sup>50</sup>

After these preliminary issues were put aside, what little was left is startling. Under the compelling-interest test, if a course of action is religiously required, and if it is substantially burdened by secular law, the only question remaining is whether the government interest is “compelling enough” as an abstract notion to outweigh the asserted religious claim. The inquiry does not involve, in any way, whether we, as a society, approve or disapprove of what the religious claim asserts. Rather, we approach the claim with a norm-neutral eye, and simply ask if the government interest so compelling that it should be upheld – as an abstract matter – against the opposing (and unimpeachable) religious claim.

This is, again, a departure from the way that other disputes are handled. If a party asserts a free-speech claim, or a child-rearing claim, or a personal privacy claim, or a national security claim, it is routine judicial practice to evaluate that claim – its social desirability, its internal rationality, its effects on others – in distinctly normative terms. We do not shirk from evaluating, and condemning, claims that parties to litigation assert. However, religious claims are different. They enjoy a kind of unspoken “normative immunity” – an immunity from evaluation in terms of the norms of the community of which they are a part. It is only in the *most extreme* cases – when the asserted public

<sup>50</sup> See *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 304–05 (1985). In this case, the Court denied a free-exercise claim on the ground that government action did not actually burden the claimant’s religious beliefs. Under more recent federal and state statutes, lower courts in particular have used the “substantial burden” piece to deny religious claims. This has involved a circuitous argument that religious beliefs, as articulated by the religious claimant, did not – in fact – conflict with government demands. See also, *Patel v. Bureau of Prisons*, 515 F.3d 807 (2008); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 86 P.3d 1140, 1153 (Ore. App. 2004), *aff’d*, 111 P.3d 1123 (Ore. 2005); *Vineyard of Christian Fellowship v. City of Evanston*, 250 F.Supp. 2d 961, 991–92 (2003). These holdings ignore the truism that the religious claimant obviously believes that her beliefs *are* burdened, since that assertion is the basis of the lawsuit. The idea that the court knows the claimant’s religious beliefs and their impingement better than she does is not convincing. It is perhaps for this reason that the “substantial burden” requirement has been eliminated from some more recent religious-freedom statutes. See, e.g., Ala. Const. Art. I §3.01 (government “shall not burden” religious exercise); V.A.M.S. §1.302, N.M.S.A. 1978, §28-22-3, and Gen. Laws 1956, §42–80.1–3 (government “shall not restrict” religious exercise).

interest can prevail, in the abstract, against all comers – that the test decrees that the religious claim will fail.<sup>51</sup>

Against this doctrinal backdrop, and its textual importation into current statutes, Tebbe advances a notion of reform. Through his suggested substantive principles to be applied in religion/equality conflicts, he advances what might be seen as mainstream suggestions in any other context but represent a radical turn in this. When conflicts between religious claims and equality norms arise, he argues, adjudication must involve normative scrutiny of religious claims.<sup>52</sup> Under the first evaluative principle, courts must evaluate religious claims in terms of their *harm* to others.<sup>53</sup> If a religious claim harms third parties, that alone can be a reason to deny the religious claim.<sup>54</sup> In addition, courts must evaluate religious claims in terms of their *fairness* to others.<sup>55</sup> Accommodation of a religious claim cannot be done “if that would be meaningfully unfair to other citizens” – for instance, if granting the religious believer exemption from secular law should afford her similar benefits or freedoms not afforded to citizens of other faiths.<sup>56</sup>

There are, of course, objections that could be made to these principles on various grounds. For instance, the meaning of sufficient “harm” to others is potentially subject to many different interpretations, and concern for “fairness” to others conceivably could be used to eliminate the notion of accommodation guarantees. However, the importance of these principles – in my view – is not whether they are perfectly (as a normative or doctrinal matter) correct or incorrect, or whether their implementation (as a practical matter) is trouble-free. Rather, their importance lies in the bold assumption that religious claims *should be subject to normative critique at all*. If

<sup>51</sup> It was this concern that was, in substance, behind the Supreme Court’s abandonment of the compelling interest test. As the *Smith* opinion stated, “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.” As a result, all that is left is whether a “presumptively invalid” law (as applied to the religious objector) “protect[s] an interest of the highest order” – and not “many laws will . . . meet [that] test.” See *Smith*, 494 U.S. at 887, 888.

<sup>52</sup> See *TEBBE*, *supra* note 2, at 10.

<sup>53</sup> *Id.* at 49–70.

<sup>54</sup> *Id.* at 66.

<sup>55</sup> *Id.* at 71–79.

<sup>56</sup> See *id.* at 16.

a religious claim harms identified others, *that alone* – under Tebbe’s principles – can be enough to deny the religious claim. We do not have to twist or somehow elevate that problem into an abstract notion so that it qualifies as some kind of “compelling-government-interest” claim.<sup>57</sup> Similarly, the effect of granting a particular religious exemption – in terms of fairness to others – must be determined and acknowledged. Even if there is no “absolutely compelling” interest in a particular case – even if the case does not, in public terms, present a “do-or-die situation” – if religious privilege creates demonstrable unfairness to others, the court – for just that reason – can deny the religious claim.

Do these principles have practical consequences? As Tebbe explains with myriad examples throughout his book, they most certainly do. Take, for instance, those situations in which a religious employer refuses to afford particular health-care benefits to his employees, on the ground that providing those benefits (as required by law) will violate his religious beliefs. In such cases, it might be difficult to present every statutory mandate in favor of every employee as a do-or-die, “compelling” government interest; but the unfairness to particular employees from such denials of coverage might well require rejection of the religious claim.<sup>58</sup>

The principle of fairness to others is also of potentially dispositive importance. There are many situations in which a religious accommodation “imposes no appreciable harm on anyone else,” but nonetheless works unfairness.<sup>59</sup> The crux of this situation is that the accommodation “lifts burdens [for the religious adherent] that other citizens in a similar situation would also like to avoid.”<sup>60</sup> When unfairness to others would be of a sufficient magnitude to allow the exemption would have to be decided on a case-by-case basis. However, obvious examples (that Tebbe discusses) are exemptions from the draft, from sales taxes, and from public accommodations laws.<sup>61</sup>

<sup>57</sup> See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Thomas v. Review Bd.*, 450 U.S. 707, 717–19 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 20–21 (1992).

<sup>58</sup> TEBBE, *supra* note 2, at 49–51, 68–70.

<sup>59</sup> See *id.* at 71.

<sup>60</sup> *Id.*

<sup>61</sup> See *id.* at 73–78. Tebbe identifies those situations in which unfairness is “serious enough,” by suggesting only those cases in which “equal citizenship” is implicated should



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In conclusion, Tebbe's methodological approach and prescriptive principles have the potential to cut, incisively, into the muddled thinking and paralysis that surround consideration of religion/equality conflicts. They acknowledge, in no uncertain terms, that judicial review of religious claims must be distinct from the way that those claims are regarded by those who advance them. Religious adherents can believe that religious commands are beyond secular evaluation and critique; secular courts cannot. In addition, in the making of that critique, secular courts must affirm the methods of decision-making that are used in all cases, and they must apply the substantive principles that courts are empowered and required to protect. It is an "old saw" that no individual action – including religiously motivated action – is absolutely protected by government, or beyond the power of the courts. Standing back, it is surprising, perhaps, that we need to hear this important message; but it is just as certain that we do.

come within the principle's prohibition. *See also id.* at 76. How effective this idea might be in limiting the fairness principle is open to debate. However, there is no doubt but that the principle of fairness to others captures a deeply resonating and intuitive conviction; and that it will preclude the granting of religious claims that would have been granted under traditional tests.